Stay Security *and* United Union of Security Guards (Independent), Petitioner. Case 5–RC–13842

May 28, 1993

DECISION GRANTING REVIEW

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On February 9, 1993, the Regional Director for Region 5 administratively dismissed the instant petition on the ground that it was barred by a collective-bargaining agreement between the Employer and the Intervenor.[1] The Petitioner filed a timely request for review of the dismissal and the Intervenor filed an opposition to the Petitioner's request.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has duly considered this matter and has decided to grant review and affirm the Regional Director's administrative dismissal.

This case presents the issue of whether a collective-bargaining agreement covering a unit of guards between an employer and a labor organization that admits both guards and nonguards to membership (a guard/nonguard union) bars a petition for an election in a unit composed solely of guards filed by a labor organization that admits only guards to membership. For the reasons described here, we conclude that such an agreement will bar the petition.

The facts are brief and are not in dispute. The Employer provides guard services at various Federal buildings in Baltimore, Maryland. The underlying collective-bargaining agreement between the Employer and the Intervenor covers certain of the employees performing guard services and is effective from July 2, 1991, to July 3, 1994. In September 1992, the Employer recognized the Intervenor as the representative of the guard unit involved here and the parties agreed to apply the contract to this unit.

In pertinent part, Section 9(b)(3) prohibits the Board from certifying a guard/nonguard union as the representative of a unit of guards. This prohibition was inserted in the Act as part of the Taft-Hartley Amendments of 1947. When initially confronted by the issue of the application of contract-bar rules where the contracting union would not be qualified for certification because of Section 9(b)(3), the Board held that it would not apply contract-bar principles to bar a rival petition. In doing so, the Board in *Columbia-Southern Chemical Corp.*,[2] concluded that its decision not to apply the contract-bar rules gave ''recognition to the basic intent of Congress that guards should not be represented by unions which admit to membership employees other than guards.''

Seven years later the *Columbia-Southern* decision was reversed in *Burns I*.[3] There the Board held that the *Columbia-Southern* policy exceeded the statutory requirements of Section 9(b)(3). The Board noted that Section 9(b)(3) did not make it inappropriate for an employer to recognize a guard/nonguard union for a unit of guards but only barred certification by the Board. Thus, the Board determined that the absence of a Congressional declaration that voluntary recognition is illegal evidences a deliberate Congressional decision not to invalidate these voluntary contracts. Accordingly, the Board saw no basis for refusing to apply its contract-bar rules in such cases.

The Regional Director relied on *Burns I* in dismissing the instant petition. In doing so, however, he noted that the Board's decision in *University of Chicago*,[4] appeared to question the continuing viability of *Burns I.*

In *Wells Fargo Corp.*,[5] and in *University of Chicago*, the Board reversed two longstanding practices in the application of Section 9(b)(3). In *Wells Fargo*, the Board refused to issue a bargaining order on behalf of a guard/nonguard union for a pure guard unit and in *University of Chicago* the Board reversed the practice of permitting guard/nonguard unions to intervene in an election, to have their names included on the ballot and, if they won, to have a certification by the Board of the arithmetic results of the election.

In deciding each of these cases, the Board specifically declined the invitation of the dissenting Board Member that it reverse *Burns I.* In doing so the Board commented that the issue of contract-bar was ''irrelevant'' to the issue in *Wells Fargo* and that it was not raised by the facts of *University of Chicago*. Four years later in *Corporacion de Servicios Legales de Puerto Rico*,[6] the Board decided that a contract covering a combined professional/nonprofessional unit would bar a petition seeking a unit of only the professional employees, even though there had been no professional self-determination vote. In doing so, the Board noted that at least one court of appeals had commented on the ''continuing viability'' of *Burns I.* Id. at 613.

We affirm that continuing viability here. The policies of Section 9(b)(3) and of *Burns I* are not inconsistent. Section 9(b)(3) is grounded in a concern about the protection of certain property rights of an employer, and that concern is not undermined when the employer voluntarily waives its 9(b)(3) rights and recognizes a guard/nonguard union for a unit of guards.

[1] The Intervenor is Industrial, Technical and Professional Employees Division of District No. 1-MEBA/NMU, AFL–CIO.

[2] 110 NLRB 1189, 1190 (1954).

[3] *Burns Detective Agency,* 134 NLRB 451 (1961).

[4] 272 NLRB 873 (1984).

[5] 270 NLRB 787 (1984).

[6] 289 NLRB 612 (1988).

Our decision here merely recognizes that waiver and acknowledges a traditional, competing claim: the importance of stability in collective-bargaining agreements. It was not the purpose of Section 9(b)(3) to relieve an employer during the contract period from its collective-bargaining agreement with a union which it voluntarily recognized even if that union would not qualify under Section 9(b)(3) for certification.

Nor is the application of the contract-bar doctrine to the circumstances here inconsistent with the decision in *Brinks Inc*.,[7] in which the Board refused to process a petition for clarification of a guard's unit filed by the incumbent guard/nonguard union. In doing so, the *Brinks* panel noted that although the Act does not prohibit voluntary recognition of a guard/nonguard union for a guard unit, the Board's processes should not be ''utilized in furtherance of that end.'' The processing of a unit clarification petition by the Board may require that we interpret the agreement of the parties and may even enlarge the size of the bargaining unit. We believe that affirmative actions of this sort are, like the inclusion of the unqualified union on a ballot, proscribed by Section 9(b)(3)—at least by the spirit of that section, if not by its literal language. However, that situation contrasts sharply with the application of contract-bar principles in guard cases. Those principles do not place the Board's approval on a unit, but simply leave the parties to their agreement for the length of the contract term. In short, the principles of *Burns I*, which we reaffirm today, do not undermine the statutory goals of Section 9(b)(3), while at the same time, they assure the stability of freely established collective-bargaining agreements.

[7] 272 NLRB 868, 870 (1984).